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No. 90-6704

In The

Supreme Court of the United States

October Term, 1991

DAVID F. DAWSON,

Petitioner,

v.

DELAWARE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Delaware

REPLY BRIEF FOR PETITIONER

LAWRENCE M. SULLIVAN
Public Defender of the
State of Delaware

BERNARD J. O'DONNELL
Assistant Public Defender
Counsel of Record

BRIAN J. BARTLEY
Assistant Public Defender

Office of Public Defender
820 North French Street
Wilmington, Delaware 19801
(302) 577-3230

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT:

DAWSON'S SENTENCE OF DEATH IS INVALID BECAUSE THE STATE OF DELAWARE ASSERTED PROTECTED BELIEFS AND ASSOCIATION TO SUPPORT A SENTENCE OF DEATH 1

A. The First Amendment Bars a State From Inviting a Jury to Sentence a Defendant to Death Because of His Protected Beliefs or Associations 1

B. Beliefs and Associations Protected by the First Amendment are not *Per Se* Relevant to Warrant the Execution of a Defendant Convicted of Murder. Only Very Limited Use of Such Evidence, Not Present in the Instant Case but Illustrated in *Barclay v. Florida* and *United States v. Abel*, Would Be Permitted on Narrow and Traditional Grounds Under the Eighth Amendment 8

C. No Principle of "Parity" or "Symmetry" Espoused by Delaware Under the Eighth Amendment Prohibiting Cruel and Unusual Punishment Would Permit the State to Execute a Defendant Although His Beliefs and Associations Would Ordinarily be Protected by the First Amendment 13

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Barclay v. Florida, 463 U.S. 939 (1983) 8

Barefoot v. Estelle, 463 U.S. 880 (1983) 8

Blystone v. Pennsylvania, 494 U.S. 299 (1990) 2

Bordenkircher v. Hayes, 434 U.S. 357 (1978) 17

Brandenburg v. Ohio, 395 U.S. 444 (1969) 9

Brown v. Board of Education, 347 U.S. 483 (1954) 13

Brown v. Mississippi, 297 U.S. 278 (1936) 3

Buchanan v. Kentucky, 483 U.S. 402 (1987) 18

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 13

Caldwell v. Mississippi, 472 U.S. 320 (1985) 3

Chambers v. Mississippi, 410 U.S. 284 (1973) 3

Coker v. Georgia, 433 U.S. 584 (1977) 7

Dawson v. State, 581 A.2d 1078 (Del. 1990) 11

Estelle v. Smith, 451 U.S. 454 (1981) 18

Furman v. Georgia, 408 U.S. 238 (1972) 6

Gebhart v. Belton, 91 A.2d 137 (Del. 1952), modified *sub. nom., Brown v. Board of Education*, 347 U.S. 483 (1954) 13

Gregg v. Georgia, 428 U.S. 153 (1976) 7, 12, 15

Harris v. New York, 401 U.S. 222 (1971) 9

Harrison v. United States, 392 U.S. 219 (1968) 10

Idaho v. Wright, 110 S.Ct. 3139 (1990) 3

TABLE OF AUTHORITIES – Continued

Page

Jackson v. Denno, 378 U.S. 368 (1964) 3

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 11

McKoy v. North Carolina, 110 S.Ct. 1227 (1990) 14

Michigan v. Harvey, 110 S.Ct. 1176 (1990) 9

North Carolina v. Pearce, 395 U.S. 711 (1969) 17

Olden v. Kentucky, 488 U.S. 227 (1988) 3

Oregon v. Hass, 420 U.S. 714 (1975) 9

Payne v. Tennessee, 111 S.Ct. 2597 (1991) 2, 8, 12, 15

Texas v. Johnson, 491 U.S. 397 (1989) 9

United States v. Abel, 469 U.S. 45 (1984) 8, 9

United States v. Bakker, 925 F.2d 728 (4th Cir. 1991) 16

United States v. Havens, 446 U.S. 620 (1980) 9

Weddington v. State, 545 A.2d 607 (Del. 1988) 13

Zant v. Stephens, 462 U.S. 862 (1983) 4, 5

UNITED STATES CONSTITUTION

First Amendment ..... *passim*

Eighth Amendment 2, 6, 8, 13

STATUTE AND RULE

Delaware Rule of Evidence 403 11

ARGUMENT

DAWSON'S SENTENCE OF DEATH IS INVALID BECAUSE THE STATE OF DELAWARE ASSERTED PROTECTED BELIEFS AND ASSOCIATION TO SUPPORT A SENTENCE OF DEATH.

A. The First Amendment Bars a State from Inviting a Jury to Sentence a Defendant to Death Because of His Protected Beliefs or Associations.

The Respondent stakes its case on the broad proposition that the First Amendment imposes no restriction whatsoever upon the kind of evidence that can be used to support a death sentence at the final, "discretionary" stage of a two-stage " 'Georgia' type" of capital sentencing procedure. RB 29. It claims that ideological views that a State could neither criminalize nor use to make a capital defendant death-eligible at the "threshold" sentencing stage may be freely used at the "discretionary" stage as sufficient reasons for killing him. RB 29-30. The Government's position is the same but broader and it applies to noncapital sentencing as well: since a "defendant's attitudes, beliefs and associations often are highly relevant" to sentencing, GB 8, they can be used in aggravation without constraint by the First Amendment. *E.g.*, GB 8-9, 14, 16, 19-20.

All of this amounts to saying that a prosecutor can request, and a jury can return, a death verdict based on any ideology that the judge or jury deems sufficiently odious as a basis for a death sentence which the jurors may not otherwise have chosen to impose. If the First Amendment's prohibition against punishing unpopular

beliefs and ideas means anything, this result cannot be correct.

In contrast to the respondent's bold claim, the Court has again recently confirmed that in death penalty proceedings "[t]he state laws respecting crimes, punishments and criminal procedure are of course subject to the overriding provisions of the United States Constitution. Where the State imposes the death penalty for a particular crime we have held that the Eighth Amendment imposes special limitations upon that process." *Payne v. Tennessee*, 111 S.Ct. 2597, 2607-08 (1991). In addition, only "[w]ithin the constitutional limitations defined by our cases, [do] States enjoy their traditional latitude to prescribe the method by which those who commit murder should be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990).

Thus, it is the essence of the First Amendment, not the nemesis of the Eighth Amendment, that a State is barred from asking a jury to impose a sentence of death as a result of a defendant's ideological belief, no matter how odious that belief might be.

The only safeguard that the Respondent or the Government offers for the plainly unacceptable consequences of their positions is the illusory premise that First Amendment protection is unnecessary to avoid those consequences because of other safeguards in the capital sentencing process. RB 34-35; GB 24-26.

Specifically, both the Respondent and the Government rely on evidentiary rules and point to state-law requirements that the trial judge must find aggravating evidence (like any evidence) "relevant," and must also

exclude it if its prejudicial impact substantially outweighs its probative value (under Delaware Evidence Rule 403, which corresponds to the same-numbered rule in the Federal Evidence Rules). RB 34-35; GB 24-35. The notion that federal constitutional protections are unneeded because the States' rules of evidence provide an all-purpose safeguard against constitutional excesses has been found factually inaccurate and legally unpersuasive in case after case since *Brown v. Mississippi*, 297 U.S. 278 (1936). See, *e.g.*, *Idaho v. Wright*, 110 S.Ct. 3139 (1990); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Jackson v. Denno*, 378 U.S. 368 (1964). Here it is particularly disingenuous, for two reasons. First, the state evidentiary rules invoked, dealing with "relevance" and "prejudice," are primarily concerned with quite different interests than the First Amendment, and therefore strike balances inconsistent with First Amendment values. *Cf. Olden v. Kentucky*, 488 U.S. 227 (1988). Second, the basic conceptual position espoused by the Respondent and the Government, and by the Supreme Court of Delaware, renders these state-law evidentiary "safeguards" illusory. The Respondent, the Government, and the Delaware Supreme Court all simply assert that all facets of a defendant's "character" are *per se* relevant to capital sentencing and that a defendant's attitudes, beliefs, and associations are equatable with "character" for this purpose. RB 23-30; GB 8-9, 13-14; J.A. 188. On this premise, the application of the rule of "relevancy" to evidence of ideology proffered in aggravation simply means that the judge and jury are to make *ad hoc* determinations of which ideologies are obnoxious enough to

call for death; and "probative-prejudice balancing" simply means that the judge is somehow to discriminate between the more and less rational tendencies of a jury to condemn defendants for particular protected beliefs based on the content and nature of those beliefs.

The Respondent and the Government also suggest that a case-by-case Due Process adjudication as to whether ideological evidence is "unduly prejudicial", RB 35, or renders a trial "fundamentally unfair", GB 25, is available and superior to a *"per se* [First Amendment] rule". RB 34; GB 24-25. The supposed superiority of the government's Due Process approach stands the theory and history of constitutional jurisprudence on its head by implying that the fact-specific application of a general Due Process constraint upon capital sentencing would be *less* of an intrusion on the autonomy of state criminal law or *less* productive of litigation than a narrower First Amendment rule. Compare GB 21-23 with GB 24-25. But, in any event, the Respondent's and the Government's fundamental premise – that core belief or speech, essentially deviant ideology unmanifested in action, *is* the kind of "character" evidence they may use to call for a death sentence – deprives their proposed Due Process safeguard of any constitutional basis upon which to work. It is only by contrast to the beliefs of a judge or jury as a norm, that evidence can be held either "unduly prejudicial" or "fundamentally unfair," when the very basis of its relevance is to show that the defendant thinks, believes or associates obnoxiously.

The government contorts *Zant v. Stephens,* 462 U.S. 862 (1983), as well. Here its efforts are directed to

eviscerating *Zant*'s "suggestion . . . that a statutory aggravating factor is constitutionally invalid if it 'authorizes a jury to draw adverse inferences from conduct that is constitutionally protected' ". GB 18, quoting 462 U.S. at 885. The Government interprets this statement as directed only to those aggravating factors that make a defendant death-eligible at the first "threshold" stage of the capital sentencing process, not to aggravating factors used at the second "discretionary" stage. GB 18-19.

However, *Zant*'s reference to the impropriety of attaching the "aggravating label" to constitutionally protected conduct was clearly made in the context of the "discretionary" phase of Georgia's two-stage process. There was no operative distinction between statutory and non-statutory aggravating circumstances in the jury's discretionary penalty decision. A non-statutory aggravating circumstance carried no less weight in the jury's discretionary decision. The harm recognized was the attachment of the "aggravating label" to constitutionally protected belief and association. Had constitutionally protected belief been offered as an aggravating circumstance, it would not have been admissible at either phase in Georgia. *Zant v. Stephens,* 462 U.S. at 885. Otherwise, states would be free to punish ordinarily protected belief simply by not classifying it by statute as a punishable aggravating circumstance and thereby permitting prosecutors to punish protected belief at will.

There is simply no rational difference between the two *Gregg* or "Georgia-type" stages for First Amendment purposes. The First Amendment is not concerned with

regularizing the application of criteria for capital sentencing (as is the Eighth Amendment rule of *Furman v. Georgia*, 408 U.S. 238 (1974) and its progeny), but rather with assuring against the penalization of constitutionally protected conduct. It is immaterial whether such penalization occurs in a single-factor or a multi-factor decisional process, one that is rule-bound or one that is discretionary. Compare GB 19. A parade-permit ordinance that allowed time, place, manner, *and* content of the parade sponsor's message to be "weighed" in a system of guided discretion by the permit-issuing authority would be no less offensive to the First Amendment than an ordinance that omitted the first three factors.

The government argues that the distinction between using constitutionally protected conduct as the basis for death-eligibility at the "threshold" stage and using it as the reason for a death sentence at the "discretionary" stage is just common sense: "it strains common sense to assert that a sentencing authority could not consider [an academic] . . . essay [articulating the abstract argument that prison guards deserve to be killed by prison inmates] as some evidence of a defendant's character and future dangerousness". GB 19. But excluding such evidence does not strain common sense at all if common sense accepts the premise that abstract essay-writing unconnected with inciting violent actions is constitutionally protected free expression. What does strain common sense is the Government's use of this example to show a supposed distinction between the first and second stages of a Georgia-style capital sentencing procedure. If common sense really called for the use of the hypothetical essay at the second stage of such a procedure, the same common

sense would equally call for its use at the first stage – a use the Respondent concedes is unconstitutional: "Admittedly, the Constitution might bar a state legislature from using [protected expression] as a death penalty trip wire." RB 24.

The Government is equally wrong in its second set of "examples," found at GB 20. There it makes the point that a crime which could not itself be punished by death under *Coker v. Georgia*, 433 U.S. 584 (1987), can nevertheless be used at the second stage of the sentencing process to "persuade[ ] the jury that the defendant's record is so bad that he should be sentenced to death". GB 20. Of course it can. Such a crime can also be used at the *first* stage of the Georgia-style process, as an aggravating circumstance which make the defendant death-eligible. Most states use at least some noncapital prior felony convictions in both ways. The Government utters a purported although counterfeit distinction between these stages; the real distinction is between the use of felony convictions and the use of constitutionally protected speech, belief or association *at any stage* as an aggravating factor calling for the death sentence.

Although both the defendant and the respondent acknowledge that this Court's teachings recognize it is desirable that the jury have as much information as possible when it makes the sentencing decision, the respondent and the government have ignored a long-standing limitation on the scope of that evidence: "So long as the evidence introduced and the arguments made at the presentence hearing *do not prejudice* a defendant, it is preferable not to impose restrictions." (emphasis added), *Gregg v. Georgia*, 428 U.S. 153, 203-204 (1976). And as the Court

recently reiterated in *Payne*, "the rules of evidence generally extant at the federal and state levels anticipate that relevant, *unprivileged* evidence should be admitted and its weight left to the fact-finder. . . . " (emphasis added), *Payne v. Tennessee*, 111 S.Ct. at 2607 (citing *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983).

B. Beliefs and Associations Protected by the First Amendment are not *Per Se* Relevant to Warrant the Execution of a Defendant Convicted of Murder. Only Very Limited Use of such Evidence, Not Present in the Instant Case but Illustrated in *Barclay v. Florida* and *United States v. Abel*, Would be Permitted on Narrow and Traditional Grounds Under the Eighth Amendment.

Both the Respondent and the Government contend that *Barclay v. Florida*, 463 U.S. 939 (1983), supports their position that "the usually First Amendment precepts . . . have no application to the final discretionary stage of capital sentencing". RB 29-32; GB 17-18. Such a reading of *Barclay* is bizarre. The Respondent apparently arrives at it by equating racially motivated murder (in Barclay's case) with the joining of an organization that holds racist views (in Dawson's case), as though the two events were constitutionally indistinguishable. RB 32-33 n. 13. The Government, for its part, acknowledges that Dawson's situation "differs from *Barclay* in that the evidence did not show that [Dawson's] . . . membership in the Aryan Brotherhood was related to the murder itself", GB 17, but then says that this difference is immaterial because "the defendant's character, as well as the circumstances of the crime, can constitutionally be deemed

relevant to the sentencing determination". GB 17. Each misses the whole point of the difference: that the causal connection between Barclay's racism and murder took his racism outside of the realm of constitutional protection under the elementary First Amendment principle that the Government recites elsewhere in its brief but ignores here – namely, that the First Amendment does not protect ideology " ' "directed to inciting or producing imminent lawless action," ' " GB 15, quoting *Texas v. Johnson*, 491 U.S. 397, 409 (1989), quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). This principle foreclosed any First Amendment claim on Barclay's behalf, and of course his lawyers never made one.

The Government also ignores settled constitutional doctrine in rewriting *United States v. Abel*, 469 U.S. 45 (1984), as a supposedly relevant and favorable precedent. GB 16-17. The holding in *Abel* was squarely based upon a hornbook rule repeatedly applied in this Court's cases dealing with impeachment: that a defendant or a witness in his behalf cannot elect to testify, ask the jury to believe their testimony, and simultaneously deny the jury access to information pertinent to believability. *E.g., Michigan v. Harvey*, 110 S.Ct. 1176 (1990); *United States v. Havens*, 446 U.S. 620 (1980); *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971). The decisive point in *Abel*, as in any of these impeachment cases, was that the evidence in question was not being used – and, indeed, the jury was explicitly forbidden to use it – in whole or in any part as a basis for penalization, punishment or enhanced punishment; it was admitted solely as bearing on the credibility of volunteered testimony.

Both the Respondent and the Government also imply, more or less obliquely, that the prosecution's Aryan Brotherhood evidence was a "counter-point", or "counterbalance", to, or "rebutted", Dawson's mitigating evidence. RB 37-38; GB 22-23. But this is a sheer distortion of the record. Dawson's case in mitigation was presented after the trial court's ruling on his renewed motion *in limine* to preclude the prosecution's use of the Aryan Brotherhood evidence in aggravation. The prosecutor announced his intention to present the Aryan Brotherhood evidence in his opening statement at the penalty phase. J.A. 62. To treat the Aryan Brotherhood evidence now as some sort of "rebuttal" of Dawson's case in mitigation is as fanciful as it is impermissible. See *Harrison v. United States*, 392 U.S. 219 (1968). Significantly, the Delaware Supreme Court invoked no theory of "rebuttal" in upholding the admission of the Aryan Brotherhood evidence; rather, it concluded that this evidence "properly focused the jury's attention on Dawson's character." J.A. 191; see generally J.A. 182-192.

The Respondent and the Government likewise distort the record by suggesting, (both in footnote), that the stipulation between Dawson's counsel and the prosecutor as to how the Aryan Brotherhood evidence would be presented to the jury after the rejection of Dawson's First Amendment claim by the trial court makes it inappropriate for Dawson "to object to the supposed blandness of the evidence", RB 19 n. 6; see GB 26 n. 8 – that is, to the fact that the evidence showed nothing more about the Aryan Brotherhood than that it "refers to a white racist prison gang". J.A. 184. The Respondent also concedes, however, that "the prosecutors wove Dawson's . . . self-

identification as Abaddon, and his embrace of the Aryan Brotherhood into a central theme that Dawson had an incorrigible character. . . . " RB 9. As the Respondent concedes elsewhere in its brief, the stipulation avoided only the necessity of the trial court's ultimately weighing the probative value of the various possible formulations of the Aryan Brotherhood evidence against their prejudicial impact under Delaware Evidence Rule 403, RB 6, 34; the stipulation did not affect the trial court's earlier ruling that "membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America [sic] can be probative of character, at least to some extent" and is not prohibited by the First Amendment. J.A. 52.[1] In the light of this ruling, both the prosecutor and defense counsel decided what they wanted the record to show about the nature of the Aryan Brotherhood; and the stipulation was the result. The only hints of criminality or, indeed, of any non-ideological activity on the part of the Aryan Brotherhood that the prosecutor chose to put into evidence were whatever vague connotations cluster around the phrase "prison gang." Compare RB 37-38 with *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). If these do not suffice to take Aryan Brotherhood membership out of the scope of First Amendment protection – and plainly they do not – then the prosecutor asked the jury for a death sentence based

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[1] The Delaware Supreme Court found that "[t]he Superior Court ultimately concluded that the State could introduce evidence about the Aryan Brotherhood during the penalty phase of Dawson's trial." *Dawson v State*, 581 A.2d 1078, 1088, n. 8 (Del. 1990) J.A. 152.

on Dawson's exercise of First Amendment rights. Dawson's claim was fuliy preserved in the record and decided on the merits by the Delaware Supreme Court.

Furthermore, neither the respondent nor the government elaborate as to why this evidence must be "information necessary to determine the proper punishment for a first-degree murder." *Payne v. Tennessee*, 111 S.Ct. at 2608, other than claiming it is "character" evidence and that there is an "enduring moral consensus" against racism. RB 35. They are satisfied that such a belief may have permissibly been the crucial factor in the jury's decision between life and death. As the government expressly concedes with respect to this case, "[T]he jury's consideration of a defendant's constitutionally protected beliefs or associations could conceivably be the factor that tips the balance in favor of the death penalty." GB 19.

It has previously been observed by this Court, however, that the death penalty is said to serve two principal social purposes; retribution and deterrence of capital crimes by prospective offenders. Another purpose mentioned is the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future. *Gregg v. Georgia*, 428 U.S. at 183, n. 28. If that is so, the respondent does not adequately explain what is the purpose of punishing by death abstract beliefs in racial separatism or superiority otherwise protected by the First Amendment. Is it governmental retribution against those who hold such beliefs? Is deterring those beliefs by killing those who maintain them a legitimate government goal permitted by the First Amendment? Finally, may the government reduce the incidence of those beliefs by implementing

judicial procedures which are more likely to result in death by execution of those who hold such beliefs?[2]

C. No Principle of "Parity" or "Symmetry" Espoused by Delaware Under the Eighth Amendment Prohibiting Cruel and Unusual Punishment Would Permit the State to Execute a Defendant Although His Beliefs and Associations Would Ordinarily be Protected by the First Amendment.

The Respondent and the Government both argue that Dawson's claim of First Amendment protection is

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[2] If you are from Delaware, the respondent's reflections about the "enduring moral consensus" against racism, and travel over considerable geographical and temporal distances to the Civil War and to the United Nations Charter, RB 35-36, are somewhat incongruous at best. Delaware's Constitution presently provides that "separate schools for white and colored children shall be maintained." Del. Const. of 1897, art. X, Section 2. No Attorney General has attempted to abolish that provision despite numerous subsequent amendments to the state constitution. Nearly forty years ago, Delaware's Attorney General asked for relief in this Court from an order of its own Supreme Court ordering desegregation on equal protection grounds in several racially segregated "separate but equal" school districts. *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952), modified *sub. nom., Brown v. Board of Education*, 347 U.S. 483 (1954). Only thirty years ago, a Delaware state agency unconstitutionally maintained that it had no responsibility with respect to its lessee's racial discrimination in a public restaurant. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). At about the time of David Dawson's conviction, the same prosecutor who prosecuted him, asked a black defendant the "magnificent[ly] irrelevan[t]" question of whether he had been looking for "some loose white women." *Weddington v. State*, 545 A.2d 607, 610, 612 (Del. 1988).

"lopsided", RB 33, creating an "asymmetrical application" of evidentiary restrictions to the prosecution and defense: "If only the defendant could introduce evidence of his beliefs and associations, the jury would often receive an incomplete and unbalanced account of the defendant's character." GB 21; see generally RB 33; GB 20-24.

No constitutional principle of "symmetry" or "parity" allows a State, however, to argue for death at a penalty hearing without traditional constitutional restrictions simply because a defendant may offer wide-ranging evidence in mitigation of death. In fact the Court has already expressly recognized that "symmetry" simply does not exist in this context:

> In contrast to the carefully defined standards that must narrow a sentencer's discretion *to impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.

McKoy v. North Carolina, 110 S.Ct. 1227, 1234 (1990) (citations omitted) (emphasis in original).

In addition, the respondent's argument has plainly distorted Dawson's position. Dawson does not contend that prosecutors are prohibited from presenting bad-character evidence while defendants remain free to present good-character evidence. Prosecutors, however, cannot constitutionally equate bad ideology – within the quite narrow range of speech and belief protected by the First Amendment – with "bad character" and thereby automatically present bad-ideology evidence in aggravation.

This Court has never before suggested "character" evidence has the unrestricted bounds which both the respondent and the government presently urge is punishable. As has recently been confirmed in *Payne*, 111 S.Ct. at 2606-08, the role of the sentencing jury may be as conservative as is constitutionally permitted and differs little in this respect from the traditional role of sentencing judge with respect to sentencing for any other offense: "It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that '[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). "*Character* of the offender", although both Delaware and the government now contend otherwise, has never meant anything more in the death penalty context that it has in the ordinary sentencing context. That the jury consider the circumstances of the crime and the "character" of the offender had never meant anything other than that:

> These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence . . . [T]he jury's attention is directed to the specific circumstances of the crime . . . In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment . . . ' *Gregg, id.* at 197.

Death sentencing in this respect differs little from all other sentencing. Neither judge nor jury may punish, penalize, sanction, disapprove, "refuse to endorse" or whatever else the respondent may prefer to call it, any beliefs or associations protected by the First Amendment. Just as a sentencing judge could not give Jim Bakker more time for making other religious people look bad or dishonest, a sentencing judge could not decide to execute him if he were convicted for murder because a religious man should know better. *United States v. Bakker*, 925 F.2d 728 (4th Cir.1991).

Nonetheless, the Government conjures up legions of bogeymen when it says that "adoption of petitioner's position would ensure that questions of First Amendment protection would arise in virtually every case in which a State sought to offer evidence of the defendant's statements or associations in an effort to prove his character for purposes of a capital sentencing proceeding." GB 24. Despite the notable resourcefulness of capital defense lawyers in appealing constitutional issues whenever they arise, there are few cases in which anything like this First Amendment issue has indeed arisen: most prosecuting authorities and jurisdictions recognize as a matter of traditional course that First Amendment beliefs and associations may not be criminalized, penalized, or used as any basis for a sentence of death.

Furthermore, a defendant is not required to forego a constitutional right in a death penalty proceeding merely because the State may introduce wide-ranging evidence against him or because he may offer wide-ranging evidence in his own behalf. The State may not ask a jury to sentence a defendant to death, although he may be the

only surviving witness to the murder and chose not to testify in his own behalf, because he has not expressed remorse. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). "A judge [or jury] might impose a specially severe penalty solely because of a defendant's race, religion or political views. . . . In all of these instances any additional punishment would of course be . . . flagrantly unconstitutional." *North Carolina v. Pearce*, 395 U.S. 711, 742 (1969) (opinion of Black, J.).

Moreover, within the specific First Amendment context, "asymmetries" are neither inappropriate nor avoidable. By their nature, the Bill of Rights and the First Amendment are inherently a limitation on governmental power, not a restraint on individual liberties. It is expectable and fitting that people derive certain benefits from the exercise of the freedoms that the First Amendment prohibits governments from punishing. Governments frequently promote these very benefits but cannot therefore "symmetrically" penalize them. A State can, for example, support associations of public employees when these associations further the State's interest in collective bargaining but it cannot outlaw them when they oppose the State's interest by advocating higher wages for their members. A City can give its "Teacher of the Year Award" to a public-school teacher who teaches the history of the city inspirationally but it cannot punish one who teaches its history satirically. These and similar "imbalances" (*e.g.*, a State can sponsor exhibits of Afro-American or Native American art but it cannot forbid them), are a

result of the limited but vital function of the First Amendment itself. That Amendment is a restriction of government's power to trammel ideological diversity, not a general command as to how government should conduct its affairs, and still less a limitation on how people may use or benefit from the freedoms that it guarantees them.

Dawson's position therefore implies no "asymmetrical application", RB 33, that "would distort the presentation of evidence to sentencing juries and undermine the rationality of their sentencing determinations" in capital cases. GB 21. Dawson has always conceded that if a capital defendant offers evidence of his laudable beliefs or association in mitigation, the prosecution may offer relevant evidence of his less laudable beliefs and associations in rebuttal. The Government's suggestion that this is an "unmanageable" result, GB 21-22, ignores the obvious: a virtually identical procedure governs "character" evidence at the guilt phase of criminal trials in all American jurisdictions; a similar procedure is familiar in connection with the ubiquitous rule that forbids "bolstering the credibility of an unimpeached witness" but allows the rebuttal of impeachment evidence; and another very similar procedure is contemplated by *Buchanan v. Kentucky*, 483 U.S. 402 (1987), in the administration of the constitutional rule of *Estelle v. Smith*, 451 U.S. 454 (1981). Nothing in Dawson's submission to the lower courts or to this Court would permit a capital defendant to present "a one-sided view of [his] . . . character" to the jury, RB 33, or preclude the prosecutor from rebutting any such attempt. The present case involves no issues of this sort.

CONCLUSION

Based upon the foregoing argument and authorities, the Petitioner's sentences of death should be vacated.

Respectfully submitted,

Lawrence M. Sullivan
Public Defender of the
State of Delaware

Bernard J. O'Donnell
Assistant Public Defender
Counsel of Record

Brian J. Bartley
Assistant Public Defender

Office of Public Defender
820 North French Street
Wilmington, Delaware 19801
(302) 577-3230

Attorneys for Petitioner